

SCHEDULING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
for the San Joaquin Valley)	01-AFC-22
Energy Center)	
_____)	

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

FRIDAY, OCTOBER 11, 2002
2:05 p.m.

Reported by:
Peter Petty
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Arthur Rosenfeld, Presiding Member

John Geesman, Associate Member

HEARING OFFICER AND ADVISORS PRESENT

Major Williams, Jr., Hearing Officer

STAFF AND CONSULTANTS PRESENT

Paul Kramer, Staff Counsel

William Westerfield, Staff Counsel

Paul Richins, Licensing Program Manager

Matt Trask, Project Manager
Aspen Environmental

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Jeffery Harris, Attorney
Ellison, Schneider and Harris

Michael A. Argentine, Project Manager
Calpine Corporation

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P R O C E E D I N G S

2:05 p.m.

HEARING OFFICER WILLIAMS: Paul, are you there? Is he online right now?

(Pause.)

HEARING OFFICER WILLIAMS: Paul Kramer?

MR. KRAMER: Right, can you hear me?

HEARING OFFICER WILLIAMS: Sure, we can hear you well. We're going to get started now.

This is a Committee scheduling conference by a Committee of the California Energy Commission on the proposed San Joaquin Valley Energy Center. CEC docket number 01-AFC-22.

Commissioner Rosenfeld, the Presiding Member, is present; and our Associate Member, Commissioner Geesman, is present. I'm the Hearing Officer, Major Williams, Jr. The Commission's Public Adviser, Roberta Mendonca, is present, as well.

I think at this point we'll have the parties introduce themselves.

MR. ARGENTINE: I'm Mike Argentine, Project Manager for the applicant, Calpine.

MR. HARRIS: I'm Jeff Harris, counsel to Calpine.

1 MR. WESTERFIELD: I'm Bill Westerfield,
2 counsel for staff. Also with us on the phone, as
3 you know, is Paul Kramer.

4 MR. TRASK: Matt Trask, Project Manager
5 in Siting Division for the San Joaquin Valley
6 Energy Center.

7 MR. RICHINS: I'm Paul Richins, the
8 Licensing Program Manager for the Commission.

9 HEARING OFFICER WILLIAMS: Okay, and of
10 course, Paul Kramer is on the phone.

11 I don't see any members of the public
12 here. Do we have anybody here from the public?
13 Roberta has indicated that we have no members of
14 the public participating.

15 We do have an intervenor, CURE. But
16 CURE is not present, either.

17 For purposes of our discussion today the
18 Committee's agenda will be taken from our notice
19 of scheduling conference of September 26, 2002.

20 Proceeding to our agenda, we will take
21 up first the issue of scheduling. I would note
22 that both parties have filed proposed schedules,
23 which call for evidentiary hearings in mid to late
24 November 2002.

25 The Committee has reviewed those

1 schedules and will be, subsequent to the hearing,
2 filing a new scheduling order.

3 The Committee also understands from the
4 parties' filings that the San Joaquin Valley Air
5 Pollution Control District released its FDOC on
6 September 26th. And I believe that staff has
7 determined that it will release its final
8 environmental document on or around October 21st.

9 Now, typically in a 12-month process
10 staff will issue a final staff assessment. And
11 the Committee notes that staff, under the six-
12 month process, has filed a staff assessment, which
13 it would supplement with an addendum under the
14 six-month process.

15 However, the Committee previously has
16 removed the San Joaquin AFC from the six-month
17 process and into the 12-month process. And staff
18 has objected to that removal. Do you want to
19 address that issue, staff?

20 MR. WESTERFIELD: Well, I think at this
21 point we ought to have Paul Kramer address it,
22 since he's the principal staff counsel on the
23 case.

24 HEARING OFFICER WILLIAMS: Paul.

25 MR. KRAMER: Yes, we do not believe that

1 the grounds for --

2 COMMISSIONER ROSENFELD: Oh, wow, that's
3 hard to hear.

4 MR. KRAMER: Are you hearing me okay?

5 HEARING OFFICER WILLIAMS: Excuse me,
6 Paul. Paul?

7 MR. KRAMER: Yes.

8 HEARING OFFICER WILLIAMS: Maybe you can
9 back off your mike a little bit?

10 MR. KRAMER: (inaudible) I'll just speak
11 quietly (inaudible).

12 We don't believe that the criteria
13 (inaudible) --

14 COMMISSIONER ROSENFELD: Excuse me,
15 Paul, it's Art Rosenfeld. I really can't
16 understand you. Did you say you're on a cell
17 phone?

18 MR. KRAMER: Yeah, (inaudible) -- is
19 this any better?

20 COMMISSIONER ROSENFELD: Yeah, what did
21 you do?

22 MR. KRAMER: Okay. Then I'll go ahead,
23 then. We don't believe that the criteria for
24 removal in the regulation section 2028 were met.
25 I think by implied stipulation of the parties,

1 we're arguing over whether the project may meet
2 either the first or the second criteria.

3 Calpine has interpreted that we say in
4 essence that if there's any unmitigated impact
5 after they initially proposed their project, and
6 the mitigation measures, that there may be an
7 impact, and therefore the project might be removed
8 from the process.

9 I think what they've done is failed to
10 read the whole sentence, each of the requirements,
11 which says that the project must be found -- it
12 must be found that the project may result in a
13 significant adverse unmitigated impact.

14 And we interpret that to require that
15 the test is to whether there's going to be an
16 unmitigated impact (inaudible) all of which
17 identified mitigation measures, whether they're
18 identified by the applicant or by staff, are
19 applied.

20 To do otherwise would allow in probably
21 almost every six-month case a party who is trying
22 to slow down the project, if you will, or you
23 know, wanted to object to it in general, to force
24 the Commission to remove it from the six-month
25 process.

1 Because Calpine's argument that anytime
2 the staff has -- in essence, anytime the staff has
3 to add mitigation measures in order to (inaudible)
4 mitigated project, that test is met.

5 And we cannot believe that that was the
6 intent of the test, because it would basically
7 make the six-month project unusable, where
8 somebody was attempting to slow it down. In other
9 words, they're an opponent.

10 And so we believe that you have to --
11 you basically can find no grounds for the removal.
12 That order that was issued certainly doesn't
13 specify what those grounds are. Calpine hasn't
14 really specified anything specific. And we
15 (inaudible) nothing specific that would meet the
16 test.

17 That's basically the essence of our
18 argument.

19 HEARING OFFICER WILLIAMS: Okay.
20 Applicant.

21 MR. HARRIS: Thank you for the
22 opportunity to respond. The written papers, I
23 think, are pretty intense, and so what I want to
24 do is back down a little bit and just kind of talk
25 about the facts in this case. Because I think

1 that's where we are right now. Those are the
2 things we need to talk about.

3 We're in these circumstances largely due
4 to circumstances beyond the control of both the
5 applicant and the staff. And I want to make that
6 point, even though you've seen staff and applicant
7 go back and forth on these issues. To a large
8 extent we haven't controlled our own destiny here.

9 The final determination of compliance
10 has been issued, basically at day 271 in a 180-day
11 process. And so I wanted to start my remarks by
12 noting that, and saying that, you know, staff has
13 treated us, I think, in generally very fair.
14 We've had very good response with the staff.
15 We're down to just a few issues, we really are, I
16 think maybe two or three.

17 So, the tenor of the papers that you've
18 seen before you on this issue, I think, don't
19 fairly reflect the interaction we've had with
20 staff.

21 Having said that, though, we do have a
22 basic disagreement with staff about what your
23 regulations provide. And at the end of the day,
24 although there are policy arguments that are
25 always made in these circumstances, I think it's

1 fair to say that the regulations of the Commission
2 control. And that's what we've petitioned
3 pursuant to 2028, and the Commission's
4 interpretation of those regulations.

5 Basically, as Paul mentioned, there are
6 four different findings that can be made under
7 2028. Any one of those findings is sufficient for
8 removal. And we think the two that are at issue
9 here are the first one, 2028(a)(1) and (2), the
10 first two. Talk about the potential for
11 significant impacts and talking about the
12 potential for significant adverse effect on the
13 environment.

14 The staff's analysis, in our view,
15 ignores one fundamental concept, and that's
16 basically this. Under CEQA, to impose a
17 mitigation measure you must find a potentially
18 significant adverse impact. And what staff has
19 done, the card trick here, if you will, is to say
20 essentially, well, if we throw all of this
21 additional mitigation on these three or four areas
22 that we're concerned about into the mix, then
23 potentially there aren't any significant impacts.

24 And what that ignores at its essence is
25 that intervening step, which says before there can

1 be a proposed mitigation measure, there has to be
2 a finding of significant impact.

3 And so clearly, I think, under number
4 one, the criteria under 2028 is met. Similarly
5 with the transmission system. Although again we
6 don't disagree with staff's conclusions
7 necessarily. Staff is talking about potentially
8 needing additional mitigation there.

9 So I think the Committee's decision has
10 to be guided by the regulations. The regulations
11 are clear. I think the fact that there are
12 mitigation measures being proposed at this late
13 stage are clear evidence that there has to be a
14 finding of potentially significant impact. That's
15 all you're required to find under your own
16 regulations.

17 As to some of the equitable arguments
18 made by staff, contrary to staff's assertions,
19 Calpine has not enjoyed the benefit of the six-
20 month process. Again, that's due to circumstances
21 largely beyond our control and beyond the staff's
22 control. But clearly the primary benefit of a
23 six-month process is a license within 180 days.
24 That's not going to happen here.

25 Further, the staff cites to no authority

1 for its general proposition that we've enjoyed
2 some benefits because I don't think you'll find
3 that authority in your regulations.

4 Again, this matter needs to be decided
5 by the Commission's regulations; and 2028 is very
6 clear. It even sets forth the timeliness for such
7 a petition. It's before the filing of testimony.

8 And so we're very much where the Commission
9 contemplated we would be in this process when we
10 made the petition.

11 Staff's arguments about our obligations
12 under power sales contracts with DWR, I think, are
13 wholly irrelevant. The Commission needs to be
14 guided by your regulations, not by contractual
15 matters that are wholly outside the regulatory
16 proceeding. I will note that.

17 I will also note that in some cases
18 staff's interpretations of those contracts are
19 simply wrong. And to equate the six-month process
20 with those contracts is wrong. And I'm certainly
21 willing to talk in more detail about that, if need
22 be.

23 Finally, if you go to the staff's
24 proposed schedule I think that really does provide
25 the strongest evidence that this case meets the

1 requirements under 2028. Under the staff's
2 proposed schedule the Committee is given
3 essentially six days from the filing of reply
4 briefs to file a PMPD. Staff proposes that reply
5 briefs be filed on December 3rd. And that the
6 PMPD be issued on December 9. Six days, assuming
7 you work through the weekend on that.

8 I think what that shows, focusing on
9 that six-day period, it shows the fallacy that
10 this project does not comply with the requirements
11 of 2028.

12 First off, fallacy number one, there are
13 no prohibitions in the 12-month process against
14 the Commission issuing a decision in five days, in
15 six days or 2 days. The suggestion that only
16 under the six-month process could the Committee
17 issue a timely PMPD is simply not supported, I
18 think, by the law or the regulations.

19 The second fallacy, I think, in the
20 staff's argument about this particular issue is
21 that essentially this is a remedy with no relief
22 for my client. Let me explain what I mean by
23 that.

24 If you assume the Committee has 20 days
25 under the six-month process to issue a PMPD, and

1 the Committee fails to meet that 20 days, the
2 project is not deemed approved. The applicant, in
3 essence, has no recourse. And so while the
4 regulation does provide a deadline, there's no
5 remedy for anybody in that circumstance. And,
6 again, in the 12-month process there's no reason
7 it couldn't be filed sooner.

8 I think the biggest problem with staff's
9 position is that it confuses two things. It
10 confuses receiving a PMPD in 20 days with the idea
11 of writing a PMPD in 20 days. And let me explain
12 what I mean by that.

13 The reason under the six-month process
14 your regulations say that you can have a decision
15 within 20 days of the end of evidentiary hearings
16 is that those regulations assume that there are no
17 significant impacts under CEQA, and that there are
18 LORS compliance and that there are no impacts on
19 the transmission system.

20 If you assume those things, essentially
21 at the point that the staff issues its staff
22 assessment, and the applicant files their
23 testimony agreeing with those things, the
24 Committee can begin basically writing the proposed
25 decision at that point. That's day 120 in the

1 180-day process.

2 And so, as I looked at staff's schedule
3 and saw six days for a PMPD, I wondered what the
4 problem was. Clearly the problem is that the
5 staff's analysis doesn't recognize what the
6 regulations recognize. And that is that there be
7 no impacts, that there be no LORS compliance
8 issues.

9 The other point I want to make on that
10 is that staff has not proposed a schedule that is
11 consistent with the six-month process. Let me be
12 very specific about that. In staff's initial
13 filing they included a suggested schedule for the
14 six-month process. And we responded to that in
15 our opposition.

16 In the staff's most recent filing
17 they've put forth a schedule that includes
18 briefing. If you compare the suggested schedule
19 for a six-month process with the staff's proposed
20 schedule, there's no briefing period in the
21 suggested schedule. Why is that? There's no
22 briefing period in the suggested schedule
23 precisely because of the anticipation that the
24 significant impact issues have been resolved,
25 transmission issues have been resolved, and the

1 LORS issues have been resolved. So we can all
2 write briefs saying that they've been resolved or
3 not.

4 And so I think that filing clearly
5 suggests that under the six-month process, the
6 lack of briefing is clearly related to the
7 underlying regulations, which say again, only a
8 potential of defined significant impacts.

9 In a true six-month process the
10 Committee would have plenty of time to write a
11 PMPD; they wouldn't be required to write one in 20
12 days; they wouldn't be required to write one in
13 six days after briefing.

14 The CEC regulations on removal are very
15 clear. They talk about the findings that have to
16 be made. At the end of the day, they don't
17 require that the applicant agree that additional
18 mitigation is necessary. All they require is a
19 finding by the Committee that these issues are
20 made.

21 And I would point out, too, historically
22 there's precedent for the Committee to do the
23 removal precisely the way they've done in this
24 case. The Russell City case is essentially in the
25 same posture. And to the extent there isn't any

1 precedent with six-month siting regulations, it's
2 consistent with our position.

3 So, based upon where we are in this
4 case, the record in this case, number one; based
5 secondly on what the siting regulations provide,
6 the requirements of 2028 have been met. And the
7 Committee's prior order for removal should be
8 sustained, and I think ratified through a
9 subsequent order that confirms the removal.

10 HEARING OFFICER WILLIAMS: Thank you
11 very much --

12 MR. KRAMER: May I respond?

13 HEARING OFFICER WILLIAMS: Excuse me,
14 let me finish thanking Mr. Harris before you give
15 your response. You get the final word, it's your
16 motion.

17 So, go right ahead.

18 MR. KRAMER: Well, I don't know if I
19 want to lose the final word by pointing out that
20 originally it was their motion; they bear the
21 burden. To the extent that the Committee issued
22 that previous order, it was issued prior to the
23 expiration of the time for other parties to
24 comment.

25 So I'm reluctant to agree that we are

1 now bearing the burden of convincing the Committee
2 to modify its previously -- what's the word -- its
3 previous order that was issued earlier, and
4 without input from us.

5 I would like to point out, though, that
6 Russell City I don't believe is precedent here
7 because that was a case where there really, as I
8 was told, after application of all the mitigation
9 measures there remained an unmitigated visual
10 impact. And it was necessary to override. That
11 sounded like a proper case for removal.

12 I'd also note that ironically when staff
13 originally brought a motion for removal in that
14 case, and Calpine resisted the removal. It was
15 only later in the process that the removal was
16 granted. But initially Calpine was resistant.

17 Finally, I would agree that the
18 regulation is clear, but Calpine is misreading it.
19 Their reading, it's probably academic at this
20 point because a six-month process is not likely to
21 be used by anyone else, but their reading would
22 allow any person to (inaudible) basically to toss
23 out almost any project that I can think of from
24 the six-month process. So I don't believe their
25 interpretation is reasonable.

1 We have to measure the mitigation after
2 all identified mitigation measures are proposed,
3 regardless of who identifies them.

4 HEARING OFFICER WILLIAMS: Is that all?

5 MR. KRAMER: Yes.

6 MR. HARRIS: If I might respond on the
7 Russell City issue?

8 HEARING OFFICER WILLIAMS: Yes.

9 MR. HARRIS: I think it's been raised
10 that -- correct something. There was not an
11 override in Russell City. Staff recommended that
12 there be an override, because staff, in their
13 staff assessment, said we found a significant
14 impact. But we recommend the override.

15 The Committee in that case took the
16 staff's evidence and they took the applicant's
17 evidence, so the issue was actually litigated.
18 And found no significant impacts, so the override
19 was not required at that point. So I wanted to
20 clarify the factual scenarios there.

21 I would also point out in the Russell
22 City case staff did file a petition to convert,
23 and among the issues that they cited were the fact
24 that the process had taken a lot longer than they
25 thought that it should.

1 And specifically as to the issuance of
2 an FDOC, staff stated in that case the tardiness
3 of the Air District's documents clearly make it
4 impossible for staff to evaluate the impacts of
5 mitigation and make a lengthier proceeding
6 inevitable.

7 So, in terms of consistency of position,
8 in the Russell City case, staff argued essentially
9 that de facto 12-month process was grounds for
10 removal.

11 So I just wanted to point out that
12 inconsistency.

13 HEARING OFFICER WILLIAMS: Thank you,
14 sir. Commissioner Rosenfeld, do you have any --

15 COMMISSIONER ROSENFELD: No.

16 HEARING OFFICER WILLIAMS: Commissioner
17 Geesman?

18 COMMISSIONER GEESMAN: No, I don't.

19 HEARING OFFICER WILLIAMS: Okay.

20 MR. RICHINS: Major, could I make a
21 policy discussion --

22 HEARING OFFICER WILLIAMS: Excuse me.

23 MR. RICHINS: -- strictly nonlegal?

24 HEARING OFFICER WILLIAMS: Introduce
25 yourself for the record, please.

1 MR. RICHINS: My name's Paul Richins. I
2 just wanted to address the Committee if they would
3 like to entertain a policy discussion on the
4 matter?

5 COMMISSIONER ROSENFELD: I'm not quite
6 sure what that means.

7 MR. RICHINS: I'm Paul Richins, the
8 Licensing Program Manager for the Commission.

9 Staff has concerns about moving the
10 project from a six-month to a 12-month process for
11 policy reasons as well as legal reasons.

12 This particular project has a contract
13 with the Department of Water Resources. That
14 contract requires construction to begin within one
15 year of our licensing --

16 HEARING OFFICER WILLIAMS: Excuse me,
17 Mr. Richins, I have a problem with your discussing
18 this DWR contract. I don't see that the DWR
19 contract is relevant to our proceedings here,
20 whether or not this project be a six-month or 12-
21 month project.

22 So I think you're going outside the
23 scope of what we need to consider.

24 MR. RICHINS: Well, I would disagree. I
25 would like to make the connection for you if you'd

1 like.

2 The connection is that the Energy
3 Commission and the Governor's Office is concerned
4 about adequate supply and price volatility in
5 years 2005 and 2006.

6 We have estimates that things are going
7 to be fairly stable in the next couple of years.
8 Beyond 2005, 2006 there's much concern. And a lot
9 of questions.

10 And so how I'd like to tie this in is
11 that if the project is moved from the 12-month
12 process -- moved from the six-month to the 12-
13 month process, there is no requirement that the
14 project begin construction in a timely manner, so
15 that the needs that we are forecasting can be met
16 from the standpoint of this project becoming
17 operational by year 2005 or 2006, so that the
18 uncertainty in those years can be reduced.

19 And so we do see a connection with the
20 contract and the policies of the state from the
21 Governor's Office down through the Energy
22 Commission to require and to try to solve the
23 problem that we're forecasting in the next couple
24 of years.

25 Calpine has told us in the past that

1 they are waiting for market indications before
2 they finance and move forward with projects. So
3 many projects that the Energy Commission has
4 approved are kind of in a wait-and-see mode by
5 Calpine, because of financial markets and the
6 market here in California for electricity.

7 And so we feel that it's very important
8 that regardless if you move it from the six-month
9 or -- regardless if you leave it in the six-month
10 or you move it to the 12-month, that you place a
11 condition of certification on the project, if
12 approved that construction begin within 12 months,
13 to be consistent with the contract that they have
14 with DWR.

15 And that's my policy argument that
16 perception is very important. The six-month
17 regulations place a priority on this project to
18 move through our process.

19 We have about 20 projects here before
20 the Commission. Last month we processed eight
21 PSAs and FSAs. And so there's a tremendous
22 workload still here at the Commission.

23 If this project is moved from the six-
24 month to 12-month process, that will send a
25 message that this is a lower priority. And it

1 will have to compete for resources with the other
2 projects. Whereas in the six-month process
3 regulations require the Energy Commission to
4 perform and come up with a timely decision.

5 It also requires the applicant to
6 perform --

7 HEARING OFFICER WILLIAMS: What
8 competition for resources --

9 MR. RICHINS: -- construction --

10 HEARING OFFICER WILLIAMS: -- are you
11 talking about? The staff assessment is already
12 completed. All you're doing is --

13 MR. RICHINS: I guess I'm talking about
14 the Commission and the Commissioners and the
15 Hearing Office and the rest of the hearing times,
16 there are hearing time -- we heard from the
17 counselor for the applicant that there were issues
18 to be litigated in this case. I don't necessarily
19 agree with him, but he painted a picture that
20 there was a lot of issues that were still
21 outstanding that needed to be litigated.

22 So there's going to need some work to
23 address those issues during evidentiary hearings
24 apparently.

25 (Pause.)

1 HEARING OFFICER WILLIAMS: The Committee
2 doesn't see any need for the applicant to respond
3 to those comments.

4 I think the comments related to the DWR
5 contract are not within the purview of what we
6 will consider in this matter.

7 Okay. So, I take it then that the next
8 order of business will be the Committee's issuance
9 of a new schedule, and any other pertinent orders
10 that are needed based upon our discussions here
11 today.

12 Does anybody else have anything further?

13 Okay, I think we're concluded.

14 (Whereupon, at 2:34 p.m., the scheduling
15 conference was adjourned.)

16 --o0o--

CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
do hereby certify that I am a disinterested person
herein; that I recorded the foregoing California
Energy Commission Scheduling Conference; that it
was thereafter transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
conference, nor in any way interested in outcome
of said conference.

IN WITNESS WHEREOF, I have hereunto set
my hand this 12th day of October, 2002.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345